

**IN THE INDUSTRIAL COURT OF SWAZILAND
HELD AT MBABANE**

CASE NO. 123/2003

In the matter between:

NTOKOZO JOSHUA SIKHONDZE

APPLICANT

and

SWAZILAND WATER SERVICES CORPORATION

RESPONDENT

CORAM:

NKOSINATHI NKONYANE: JUDGE

DAN MANGO: MEMBER

GILBERT NDZINISA: MEMBER

FOR APPLICANT: MR. A.M. LUKHELE

**FOR RESPONDENT: : ADV. P. FLYNN (INSTRUCTED BY
SIBUSISO B SHONGWE & ASSOCIATES)**

JUDGEMENT 09.08.07

[1] The applicant instituted the present proceedings for determination of an unresolved dispute against the respondent in terms of section 76 of the Industrial Relations Act of 2000 as amended.

[2] The applicant is a former employee of the respondent. He was employed by the respondent on the 1st March 1991. He worked continuously until he was dismissed on or about the 17th October 2002.

[3] The applicant was dismissed by the respondent after he was accused and found guilty of having made a statement in the local television news broadcast, known as STBC, to the effect that the management of the respondent was corrupt and failed to substantiate the allegations.

[4] During the trial, it was common cause that the applicant did make the statement on television. His defence before the court was that it was unfair to hold him liable for the statement in his personal capacity as he made the statement in his capacity as President of the Union that was recognized by the respondent.

[5] There was no dispute that the workers Union existed at the respondent's undertaking, that it was a recognized Union and that the applicant was its President. The recognition agreement was handed to court and it was marked annexure RW1 "A".

[6] The applicant was charged by the Human Resources Director, Mr. Leonard Nxumalo. When Mr. Nxumalo was asked why did he charge the applicant instead of the applicant being charged by his supervisor, he said this was a serious matter which affected the reputation of the respondent as the utterances were directed to the management.

[7] Nxumalo was also asked why did he charge the applicant in his personal capacity when it was known to all that he was the President of the Union. In response he said that during the investigations that were carried out, the other members of the executive committee disowned the statement that was made by the applicant.

[8] This was the position that was taken by the respondent during the trial of the case. The respondent was trying to show that the applicant had no mandate from the Union or the members to make the statement that he made.

[9] The evidence revealed that the investigation process was being recorded in an audio tape. The audio tape was however not produced in court as evidence. To the contrary, the applicant and his witnesses told the court that the workers did ask the executive to address the issue of corruption at the respondent's place with the media. It seems that they only did not specify which of the media houses the executive should approach.

[10] AW4, Pilate Shongwe who was the Secretary General at that time, told the court that the executive did give the President the go ahead in addressing the issue with the media.

Further, the Union also wrote a letter to the Human Resources Director, Leonard Nxumalo dated 9th July 2002 in which it spelt out in no uncertain terms that the applicant was carrying out his Union duties when he made the statement. The letter appears on page 15 of Exhibit "A".

Mr. Nxumalo responded to this correspondence by the Union on 11th July 2002 and insisted that the applicant was being charged as an employee of the Corporation and not as the Union

President.

It is difficult for the court to understand why the respondent took this stance in this matter. The Union was well known to the respondent. The respondent also knew or was fully aware that the applicant was the President of the Union. Further, the interview was conducted in the office of the applicant at the respondent's workplace. It was therefore highly unlikely that the applicant as President of the Union could call the reporter to come to his office at work to talk about anything except the Union business. There was no evidence by the respondent that in terms of the Union Constitution, the President did not have the power to make a press statement. The court had the privilege of viewing the video clip and heard the applicant making the statement. There was no doubt from the speech that the applicant was speaking in a representative capacity and not in his personal capacity.

[14] The respondent took a lot of time during cross examination of the applicant and his witnesses trying to show that there were no minutes of any meeting in which a resolution was taken giving the applicant a mandate to make the statement that he made on television.

[15] The evidence revealed that some of the minutes of the meetings of the Union got lost especially the minutes of 3rd June 2002. As the respondent was alleging that the applicant was never mandated in any meeting to make the statement, the burden was upon it to prove this on a balance of probabilities. From the evidence presented before the court, it cannot be said that the respondent was able to do that. The respondent was trying to make out its case through the applicant's witnesses.

[16] The evidence about the corruption was not challenged by the respondent. The evidence revealed that there was rampant corruption at the respondent's place. The managers would use company materials to build their own houses. The managers would also use the Corporation's employees during working hours to do private jobs for them. These escapades were captured by camera and reported to the Managing Director who did not take any action after that. It was literally a free-for-all. The Managing Director himself was also involved in this. He also used company materials and company employees to build his home. The applicant said he was the one who installed the intercom at the Managing Director's home. When the applicant raised this with the Managing Director, he told him that he had paid for the goods but not the labour.

[17] The workers were really frustrated by this and they decided to march to the then Minister of Housing Mrs. Stella Lukhele to present a petition about the rampant corruption at the Corporation. No action was taken.

[18] The making of the statement by the applicant on the television was therefore a culmination of events. AW4, Pilate Shongwe said the Union was under pressure from the workers to have the corruption exposed. AW3, Coxin Tsabedze said they marched to the Minister on two occasions but there was nothing that was done. Pilate Shongwe said the workers requested the executive to address the issue of corruption.

[19] The evidence revealed that the workers having marched to the Minister without any results, they decided to use another strategy to pressurize the Minister to act on the issue of corruption. The strategy was to expose the corruption to the news media.

[20] It was argued on behalf of the respondent that the court should find that the applicant was not a credible witness as he had raised a new defence before the court, which he did not raise at the disciplinary hearing.

[21] With respect, the court does not agree with the respondent. The evidence revealed that at the disciplinary hearing the applicant did not have a chance to state his defence. The applicant challenged the respondent to prove that it was really him that was appearing on the video film shot by Mr. Nxumalo from the television news bulletin. Apparently the respondent took the view that the applicant was being naive and did not bother to prove that. Once the applicant challenged the authenticity of the video film, the burden was on the respondent to prove the authenticity of the video film.

[22] The applicant also raised objections about the level of the hearing and also whether or not it was proper for RW1, Mrs. Vilakati to chair the disciplinary hearing.

[23] The case at the disciplinary hearing stage was largely grounded on the technical objections raised by the applicant. As far as the applicant's case was concerned at the disciplinary hearing, it failed to go past the first hurdle when the applicant challenged the authenticity of the video clip shot by Leonard Nxumalo. The respondent appears to have dismissed that as an idle defence. During cross-examination Nxumalo said it was the applicant's duty to call the STBC people. That was clearly not correct. The applicant having challenged the authenticity of the video clip, the burden shifted to the respondent.

[24] It was also argued on behalf of the respondent that the respondent was ambushed by the defence raised by the applicant during the trial, as it was not pleaded in the papers. Again, the court does not agree with the respondent. If the respondent was not sure what the case of the applicant was, it could simply have asked for further particulars.

[25] It was also suggested that the applicant's conduct was in breach of Rule 10 of the

Recognition Agreement. Rule 10 prohibits the issuing of unilateral press statements by the Employer or the Union. The respondent did not pursue this argument as it was clearly counterproductive to it. Any reliance on this Rule would mean that the respondent is admitting that the applicant made the statement on behalf of the Union as the Rule relates to the Employer and the Union and not individuals.

[26] The evidence also revealed that the chairperson, Mrs. Mary Vilakati was in senior management and was the Financial Director. She reported to the Managing Director. She said she was verbally appointed by the Managing Director to chair the disciplinary hearing.

[27] The applicant was accused of making a statement on television to the effect that the management of the Corporation was corrupt. The conduct of Leonard Nxumalo and his evidence before the court clearly showed that the management was not happy about this accusation. It was therefore unfair to have one of the managers of the same Corporation to preside in the disciplinary hearing. Further, after the applicant was found guilty, he appealed to the Managing Director.

[28] The evidence revealed that the Managing Director was one of the corrupt managers. He used the Corporation employees to do work at his home. The applicant himself installed the intercom at his home. The managers having clearly been offended by applicant's statement on television, he clearly stood no chance of a fair hearing.

[29] Before this court, the evidence that corruption was rife at the respondent's place was not challenged. It was therefore procedurally unfair to allow the managers who were being accused of corruption to sit and determine the guilt or otherwise of the applicant.

[30] The applicant's evidence as to when the resolution to go to the media was taken had some contradictions. These however may be attributed to the length of time that the events in question took place. It is not every contradiction that leads to the witnesses' evidence being rejected. On the overall, the evidence was clear that Union executive had pressure from the workers to bring the issue of the corruption to the attention of the media in order to put pressure on the Minister to take action.

[31] Taking into account all the above observations and all circumstances of this case, the court comes to the conclusion that the applicant was unfairly dismissed by the respondent.

[32] **RELIEF:-**

The applicant is presently unemployed. He has not been employed since his

dismissal in October 2002. At the time of his dismissal he was earning E6,000:00 per month. The applicant is asking for re-instatement alternatively payment of terminal benefits and compensation for the unfair dismissal.

[33] The respondent told the court that the position of the applicant was no longer there as there was a restructuring exercise, which resulted in its abolishment. The court does not think that it will be proper to make an order for reinstatement as some of the managers that the applicant accused of corruption are still working for the respondent. The applicant would clearly be a target for revenge. The court will accordingly make an order that the respondent pays the applicant the following amounts as his terminal benefits and compensation for the unfair dismissal;

A) NOTICE PAY	E 6,000:00
B) ADDITIONAL NOTICE	E 9,600:00
C) SEVERANCE ALLOWANCE	E24,000:00
D) COMPENSATION (E6000:00 X 12)	<u>E72.000 :00</u>
TOTAL	<u>E111,600:00</u>

No order for costs is made.

The members agree.

NKOSINATHI NKONYANE
JUDGE - INDUSTRIAL COURT

